

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

First-Class Mail and Periodicals
Service Standard Changes, 2021

Docket No. N2021-1

REPLY BRIEF OF THE PUBLIC REPRESENTATIVE

(June 25, 2021)

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I. INTRODUCTION

The Public Representative files in reply with regard to a single issue – whether the Postal Service’s proposed service standard changes are unduly or unreasonably discriminatory on the basis of geographical location, in violation of 39 USC § 403(c). For the reasons explained below, the Public Representative maintains that they are not.

II. BACKGROUND

Pursuant to 39 USC § 403(c), the Postal Service is prohibited from making “any undue or unreasonable discrimination among users of the mails” or granting “any undue or unreasonable preferences to any such user.” The Commission has established a three-part test to determine whether discrimination is “undue or unreasonable” under 39 USC § 403(c).¹

Under that test, a complainant must establish that: (1) they “ha[ve] been offered less favorable rates or terms and conditions than one or more other mailers;” (2) they are “similarly situated to the other mailer or mailers who have been offered more favorable rates or terms and conditions of service;” and (3) “there is no rational or legitimate basis for the Postal Service to deny it the more favorable rates or terms and conditions offered to others” to successfully allege a violation of 39 USC § 403(c). Order No. 718 at 28.

For the purposes of this brief, the Public Representative will assume, *arguendo*, that the first two prongs of this test are satisfied. Thus, the operative question is whether the parties opposing the proposed service standard changes in this docket can establish that “there is no rational or legitimate basis” for the Postal Service’s decision to advance the proposed changes. For the reasons explained below, the Public Representative contends that they cannot.

¹ See Docket No. C2009-1, Order on Complaint, April 20, 2011, at 28 (Order No. 718).

III. ARGUMENT

- a. Opposing parties cannot establish that the Postal Service lacked a rational or legitimate basis for the proposed changes.

No party to this docket has established that the Postal Service lacked a rational or legitimate basis for the proposed service standard changes. In fact, the Postal Service has presented ample evidence supporting its basis for the proposed changes. As explained in the Public Representative's Initial Brief, the Postal Service has provided market research and a financial analysis, both of which provide rational and legitimate bases for its decision to move forward with the proposed changes.²

Opposing parties attempt to disclaim or discredit the Postal Service's market research and financial analysis. However, these objections are largely founded on arguments that the Postal Service could have done additional research or analysis. They do not establish that the research and analysis performed by the Postal Service in this case was insufficient to constitute a rational or legitimate basis.

With regard to market research, these parties attack the sufficiency of the research conducted, arguing that it was not specific enough and that the responses are subject to interpretation.³ However, the record reflects significant evidence of market research, most notably through the Brand Health Tracker surveys. These quarterly surveys measure the relative importance of various considerations to mailers. The record also contains surveys from the Postal Service's Office of the Inspector General on mailer expectations and satisfaction.

It is not enough to argue that additional research might have been more informative or that survey responses could have been better defined. Instead, opposing parties must argue that this research is so incomplete or misleading to lose its probative value such that it no longer provides a rational or legitimate basis for the decision made – a high bar that is not met here. The question is not whether the Postal Service's process

² Initial Brief of the Public Representative, June 21, 2021 at 11-14.

³ See e.g. Initial Brief of Steve Hutkins, June 21, 2021 (Hutkins Initial Brief) at 16; Initial Brief of Douglas F. Carlson, June 21, 2021 (Carlson Initial Brief) at 4, 11.

was perfect; it is whether the market research conducted provides a rational or legitimate basis for the Postal Service's decision.

With regard to the financial analysis, the parties opposing this change appear to argue that these changes will be difficult to predict or that they personally disagree with the Postal Service's financial analysis.⁴ There is no question that the impacts of changes such as those proposed in this docket are difficult to predict. However, opposing parties cannot merely disclaim the Postal Service's financial analysis on this basis. There is nothing in the record to suggest that the Postal Service's financial analysis is flawed or otherwise insufficient as a basis for the Postal Service to use in its decision making. To the contrary, the Postal Service's financial analysis provides a rational or legitimate basis for the proposed changes.

b. Disparate geographical impacts do not prove unlawful discrimination

Opposing parties appear to argue that the disparate impact of these changes on mailers who live in more remote geographic locations, relative to the middle of this country, establishes unlawful discrimination under 39 USC § 403(c).⁵ The Postal Service contends that these changes cannot be unlawful because they are applied objectively, noting that "they do not treat different groups of users in different ways. The changes are based on time and distance, which is not only more efficient, but also more equitable."⁶ However, it is clear both that some amount of inequity in impact is tolerable and that an objective application does not provide an absolute safe harbor from 39 USC § 403(c).

Parties opposing the proposed service standards concede that the current service standards do not "result in perfect equity."⁷ As a practical matter, the physical challenges of delivering the mail highlighted by the Postal Service will result in some inequity between mailers who are closely located and those who are not. It is almost

⁴ Hutkins Initial Brief at 11-13; Carlson Initial Brief at 31.

⁵ Hutkins Initial Brief at 24-29; Carlson Initial Brief at 14-23.

⁶ Direct Testimony of Robert Cintron on Behalf of the United States Postal Service (USPS-T-1), April 21, 2021 at 30.

⁷ Hutkins Initial Brief at 29.

certain that changes of this nature will have some level of differing impact on mailers and, as the Postal Service notes, “it cannot be the case that the Postal Service is foreclosed from adopting such uniform criteria.”⁸

On the other hand, it also cannot be the case that objective application “based on time and distance” provides an absolute safe harbor against violations of 39 USC § 403(c). In the past, the Commission has determined that disproportionate geographical impacts of service standard changes on mailers can be problematic even when the changes were facially neutral and the impacts were unintentional.⁹

The differing geographical impacts of these proposed changes are not dispositive; these impacts are simply a factor that must be weighed by the Commission. The Commission must consider the impacts of these proposed changes in the broader context of this docket and look to the Postal Service’s stated bases for these changes to determine whether they justify the disparate impacts of the proposal. The Public Representative contends that the Postal Service’s bases for this decision outweigh the disparate impacts of these changes.

IV. CONCLUSION

The proposed service standard changes in this docket do not constitute unlawful discrimination in violation of 39 USC § 403(c) because no party can establish that the Postal Service lacked a rational or legitimate basis for its decision to advance these standards. The record reflects an ample basis for the Postal Service’s proposed changes, including market research and a financial analysis to support its decision in this docket. The disproportionate geographical impacts of these proposed changes do not outweigh these bases. For the aforementioned reasons, the Public Representative continues to support the proposed changes.

⁸ Response to SH/USPS-T3-2.

⁹ See e.g., Docket No. C2001-3, Commission Report Complaint on First-Class Mail Standards Service, April 17, 2006.

Respectfully Submitted,
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